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IN THE

Supreme Court of the United States

JEAN TRIGALET AND MYRA TRIGALET, AS PERSONAL REPRESENTATIVES OF THE ESTATES OF CONSTANCE TRIGALET AND MARTHA ANNETTE TRIGALET, AND LEONARD MUNSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STEVEN LEWIS MUNSON,
Petitioners,

v.

CITY OF TULSA, OKLAHOMA, A MUNICIPAL CORPORATION,
Respondent.

On Petition for Writ Of Certiorari to the United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from the parties granting consent to the filing of this brief have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel

ATLA is a voluntary national bar association with more than 60,000 trial lawyer members who primarily represent individual plaintiffs in civil actions, including actions seeking vindication of constitutional and civil rights protected under federal and state statutes, as well as damages actions for wrongful death and personal injury. ATLA's mission includes preserving and advancing constitutional rights and civil rights guaranteed by federal and state statutes.

Petitioner in this case asks the Court to resolve a conflict among various Circuit Courts of Appeal regarding the question of whether a municipality, through implementation of its unconstitutional policies, can be found to have violated the substantive due process rights of a person injured or killed as a result of the policies' implementation, absent a finding of the requisite "purpose to harm" on the part of the non-policymaking employee who engaged in the conduct which inflicted the injuries or, as in this case, resulted in deaths. Because the opinion below did not impose liability upon a City whose unconstitutional policies caused deaths, and constitutes an unwarranted departure from this Court's precedents, ATLA respectfully submits this brief as amicus curiae in support of the Petition for Certiorari.

SUMMARY OF ARGUMENT

If unconstitutional municipal policies proximately and indisputably cause death, the municipality should not be immune from liability, irrespective of whether the officers implementing the policy acted with subjective intent to injure or violate rights. Disregarding this Court's prior decisions, the Court below ruled otherwise. Petitioner now asks this Court: Where a municipality, through deliberate conduct of its policymakers, has adopted or approved of policies that are

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make a monetary contribution to the preparation or submission of this brief.

arbitrary and conscience-shocking, and such policies are the proximate cause of a person's injuries or death, should the municipality be able to escape liability under Section 1983 because its employees were not aware of, did not anticipate and did not intend the likely results of the implementation of such policies? The answer to this question must be an unqualified "no" if the principle of local governmental liability established by *Monell v. Department of Social Services,* 436 U.S. 658 (1978), is to remain viable.

If unconstitutional municipal policies that cause death are placed beyond the reach of civil rights claimants by the ignorance or "good faith" of employees effectuating those policies, such a court-made rule would create a direct incentive for local governments to employ shoddy training and wrap their agents in a cloak of ignorance – shielding municipalities from liability in contexts where they are most blameworthy. The "ignorance" immunity afforded municipalities under such a scheme would expand proportionately with the cities' failure to train and inform. Ultimately, this immunity would operate to bar relief for even the most egregious and unconscionable constitutional violations by local government, effectively placing these constitutional wrongs beyond the reach of federal law.

While the implications of such a ruling are disturbing as a general matter, they are particularly frightening in the context of police pursuit cases, which often result in unintended injuries and deaths. If the Tenth Circuit's ruling is not reviewed by this Court, those persons injured and the families of those killed in police chases that occur as a result of arbitrary and conscience-shocking policies, will be barred from a remedy under § 1983, directly contrary to the law established by this Court in *Monell.*

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION IS DIRECTLY CONTRARY TO PRECEDENT ESTABLISHED BY THIS COURT AND CREATES NEW IMMUNITY

For decades, the law of local governmental liability under 42 U.S.C. § 1983 has been settled. This Court established that local government entities are "persons" and, as such, they will be liable for injuries caused by policies that violate constitutional rights. *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978). More than twenty years ago, in *Owen v. City of Independence*, 445 U.S. 622, 650, (1980), this Court rejected a claim that municipalities should be afforded qualified immunity, and made it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit -- either absolute or qualified -- under § 1983. Thus, local government bodies may be sued directly under § 1983 where an unconstitutional official policy causes injury. *Monell,* 436 U.S. at 694. Yet, the Court below has directly undermined *Monell* jurisprudence, imposing a barrier to municipal liability that will be insurmountable as a practical matter.

Disturbing settled precedent, the Tenth Circuit also has adopted a new rule of imputed immunity. The new rule permits local governments to implement arbitrary and conscience-shocking policies that cause death with impunity, so long as those carrying out the policy act without subjective intent to injure. Such a holding disturbs the long-settled rule that liability under § 1983 is determined according to the actor's own conduct and state of mind. *Oklahoma City v. Tuttle,* 471 U.S. 808, 817-18, *reh'g denied,* 473 U.S. 925 (1985) (reiterating *Monell's* prohibition against *respondeat superior* liability).

Applying the Tenth Circuit's rationale, proof that a municipal custom or policy was the "moving force" behind a constitutional violation no longer will result in municipal

liability. *Cf., City of Canton v. Harris,* 489 U.S. 378, 385-91 (1989) (municipal liability arises under § 1983 where official custom or policy is the "moving force" resulting in constitutional violation). Even if the policy is arbitrary and conscience-shocking, in a constitutional sense, the local entity is relieved of liability if the physical conduct that implements the policy is undertaken by employees who have no intent to harm suspects physically or to worsen their legal plight. *Trigalet v. City of Tulsa*, 239 F.3d 1150, 1155 (10th Cir. 2001). That the policy proximately and undisputedly caused the harm is of no consequence.

> [E]ven if it could be said that Tulsa's policies, training, and supervision were unconstitutional, the City cannot be held liable where, as here, the officers did not commit a constitutional violation.

Id.

The Tenth Circuit's statement and rationale directly contradict *Monell* and *City of Canton*, under which liability properly is based on the violation of a constitutional right coupled with municipal responsibility for the constitutional violation. Both the constitutional violation and the responsibility for it occur at the policymaking level in this case. The act of the non-policymaking officer in engaging in the high speed pursuit is all the predicate conduct that is required. The fact that the low-level officer has committed no "predicate constitutional violation," *Trigalet,* 239 F.3d at 1154, because he lacked the requisite state of mind, does not affect the liability of the City for the constitutional harm caused by the implementation of its conscience-shocking policy.

The effect of the appellate court's ruling will be imputed immunity at the policymaking level for substantive due process violations where lower-level employees serve as both conduits for action and buffers to liability. Local governments will be immune from suit unless the victim of

the unconstitutional policy can show that the government employee possessed the requisite level of mental culpability. As in the present case, families of people who are killed as a direct and proximate result of unconstitutional policies will have no remedy under § 1983 against the government whose policies caused the deaths.

If *City of Canton*'s statement of the predicates for municipal liability is law, and if *Monell*'s prohibition against imputed conduct and state of mind under § 1983 is law, the Tenth Circuit's absolution of Tulsa for the deaths cause by its unconstitutional policies must be wrong. A municipal policy that causes deaths is itself a violation of plaintiff's constitutional rights.

II. MUNICIPALITIES ARE ACCOUNTABLE UNDER SECTION 1983 FOR THEIR OWN VIOLATIONS OF CONSTITUTIONAL RIGHTS

The Tenth Circuit relied on *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (*per curiam*), concluding that Substantive Due Process actions require proof that the employee whose actions cause harm possessed intent to injure. *Heller*, however, is irrelevant and was cast far beyond its proper locus by the appellate court.

The Ninth Circuit recognized in *Heller* that there is no Fourth Amendment injury unless an officer acts in an objectively unreasonable manner. Thus, the court upheld a jury verdict in favor of the officer based on an instruction and finding of objective reasonableness supporting qualified immunity. *Heller v. Bushey*, 739 F.2d 1371, 1374 (9th Cir. 1985), *rev'd sub nom., City of Los Angeles v. Heller*, 475 U.S. 796 (1986). The jury instructions were clear on this point and the jury clearly adjudicated "reasonableness."

Assessing whether the *Monell* claim survived the general jury verdict, however, the court engaged in obvious speculation. Assuming that the jury's ruling on individual

liability *could* have been based either on a finding that the city's "escalation of force" policy was reasonable and the officer was following the policy, or that the officer's actions were reasonable irrespective of the policy, the court assumed the latter might be true. *Id.* at 1375. However, no instruction had been given on this question. Thus, the proper ruling would have been that the *Monell* claim was waived by failure to offer the instruction or object to its omission. Rule 51, Fed. R. Civ. Pro. The Ninth Circuit's unnecessary speculation concerning the jury's mental processes forced this Court to take corrective action and, in doing so, to state:

> If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

475 U.S. at 799.

Heller holds only that, where a jury finds for an officer after proper instructions on the Fourth Amendment standard of objective reasonableness, the text of official policy governing arrests is irrelevant: the force incident to the arrest was lawful and there is no injury upon which a claim may be based. In the present case, however, there is no dispute that the officer was implementing a municipal policy that is arbitrary, conscience-shocking and unconstitutional and that the implementation of that policy resulted in the deaths of three innocent persons. *Heller*'s reasoning is not applicable.

As this Court noted, in analyzing municipal policy claims, two separate issues must be addressed: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city [was] responsible for that violation." *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). *Collins* reaffirms *Monell*, ruling that the municipality may be held liable under § 1983 when the "execution of the government's policy or custom . . . inflicts

the injury." *Id.* at 123. When an official municipal policy itself violates federal standards, issues of culpability and causation are straightforward; simply proving the implementation of the unlawful policy puts an end to the question. If official policy is unconstitutional, and is the moving force causing injury, liability will be imposed. *Board of County Commissioners of Bryan County v. Brown,* 520 U.S. 397, 404-05 (1997).

Heller did not overrule *City of Canton*, nor did it limit this obvious principle explained in *Brown*. *Heller* merely requires proof of constitutional injury resulting from an unlawful governmental policy. Such proof was completely lacking in *Heller*. It is not lacking in the present action.

The Tenth Circuit extended *Heller* far beyond its actual boundaries. This Court should correct that error and prevent the erosion of *Monell* liability that results from the appellate court's legal error and disregard for this Court's post-*Heller* precedents, which reaffirm that municipal liability is predicated on unlawful municipal policies, not the reasonableness of the actors who carry them into effect. *E.g., Collins*, 503 U.S. at 120.

The court below also disregarded this Court's holding in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *Lewis* resolved the standard applicable to determine personal liability for officers engaged in high-speed chases. *Lewis* instructs that police officers involved in high-speed chases "with no intent to harm suspects physically or to worsen their legal plight" are not liable for violations of the Fourteenth Amendment's Substantive Due Process protections.

In the Tenth Circuit's view expressed in the present case, an officer's lack of intent automatically insulates the municipality from liability, as well as the individual officer. The lower court's reliance on *Lewis* for this conclusion is misplaced, however, and is directly contradicted by the rationale set forth in Justice Souter's opinion.

This Court set a high threshold for officer liability based on a recognition that "unforeseen circumstances demand an officer's instant judgment" without the luxury of time for reflection when pursuing a suspect. 523 U.S at 853. Municipal authorities are responsible for: (1) enacting policies that determine when such pursuits are appropriate; and (2) training officers to effectuate those policies when conducting pursuits in the field. Municipal policy-making and training are not conducted under such exigent circumstances.

Tacitly acknowledging the legal distinction between individual liability based on snap field decisions, and detached policy-making and training by local government, this Court specifically stated that liability of the County of Sacramento was not before the Court because there was "no genuine factual dispute as to whether the county adequately trains its officers in the conduct of vehicular pursuits or whether the pursuit policy of the Sheriff's Department evinces deliberate indifference to the constitutional rights of the public." 523 U.S. at 838 n.2. Clearly this Court did not take the view espoused by the Tenth Circuit, that the officer's lack of ill intent and concurrent immunity could be imputed to the County, precluding the County's liability as a matter of law. Consistent with *Monell* and *Canton*, this Court acknowledged that liability of the governmental unit remained a separate issue of fact, irrespective of the officer's liability or immunity. *Id.* The Tenth Circuit's ruling contravenes this Court's analysis and ruling in *Lewis*, and this Court should grant the review requested to correct the lower court's misapplication of *Lewis* to the present case.

III. THE TENTH CIRCUIT HAS DRAMATICALLY CURTAILED CIVIL RIGHTS PROTECTION.

When considering the Petition, ATLA urges the Court to consider the practical impact of the ruling below. If the Tenth Circuit's analysis is permitted legal effect, local governments

will enjoy blanket immunity for the most offensive and facially unconstitutional measures. It should be emphasized that this is not a case where a *suspect* has been injured after a chase and claims the force used to apprehend or subdue was unreasonable. In the present case, three bystanders were killed as a result of a policy that permitted high speed chases in residential areas to apprehend suspects of property crime. Three people died, and their families were deprived of their companionship and support, because the City of Tulsa had adopted shocking and arbitrary policies that led to their deaths.

ATLA does not urge this Court to entertain *ad hoc*, result-driven disposition. On the contrary, ATLA urges this Court to consider the profound policy implications wrought by the decision below and related precedent. Section 1983 is intended to secure enormously important public benefits -- constitutional conduct by those who act under color of state law -- through the vehicle of federal civil remedies for constitutional violations. Certainly, there remains a strong federal interest in enforcing federal rights. Equally certain, 42 U.S.C. § 1983 continues to be a valuable tool to encourage adherence to federal law and protect these federal rights. As this Court stated in *Monell*, to accomplish these federal purposes, the statute should be construed "to give a broad remedy for violations of federally protected civil rights." 436 U.S. at 685.

For vehicle pursuit cases, the Tenth Circuit's rationale will limit, severely, enforcement of federal Substantive Due Process against municipalities that adopt unconstitutional pursuit policies. Bystanders injured because of facially unconstitutional policies will only be allowed to bring a federal civil rights action against local governments responsible for those policies where an officer acts with subjective purpose to harm and with no legitimate law enforcement objective. Even if killed or horribly injured, these individuals will have no right of enforcement although the policy clearly caused the harm.

Carrying the example of the present case to its logical end: What if the policy had permitted not only pursuit, but use of deadly force to apprehend car thieves, without regard to other circumstances? Instead of being killed by the collision, the bystanders were shot dead by stray bullets from guns fired by the pursuing officers. Under current law, absent a purpose to harm the bystanders, the officers may not be held liable for violating the bystanders' substantive due process rights. Pursuant to the Tenth Circuit's decision, the City would also be immune from liability for the enforcement of its unconstitutional policy. Local government policies that are facially unconstitutional are not subject to federal enforcement power, if the acting officer did not intend harm that is caused by their implementation, no matter how deliberately indifferent local government policymakers may have been to the obvious consequences of the policy.

Police pursuit cases undeniably require application of constitutional protections within difficult and emergent circumstances. While there is some justification for setting a high threshold of culpability for plaintiffs to meet before recovery is allowed against individual officers engaged in rapidly-developing, emergency-type situations, there is no legitimate reason to afford such protection or deference to the conduct of policymakers who intentionally and knowingly adopt a course of action that is deliberately indifferent to the safety and welfare of citizens.

Unless the Court is prepared to abandon important and well-established constitutional principles limiting municipal authority, it should grant the Petition and reconsider the flawed analysis of the appellate court. A facially unconstitutional policy that is the moving force causing death or injury must yield to federal civil rights and their enforcement. The Petitioner presents this Court with an opportunity to exercise its preeminent role in defining the appropriate limits of local authority and to correct an obvious error in logic and law that has serious implications, not only for civil rights, but for public safety as well.

The Tenth Circuit's opinion, if permitted to go unreviewed, will foster deliberate indifference to individual rights and invite local government to ignore constitutional limits on municipal authority. The potential for harm is obvious, as are the implications for curbing municipal disregard for constitutional protection, if the Court does not grant the Petition.

CONCLUSION

For the forgoing reasons, Amicus urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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